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# THE WILD AND SCENIC RIVERS ACT OF 1968

*A. Dan Tarlock† and Roger Tippy††*

The Congress declares that the established national policy of dam and other construction at appropriate sections of the rivers of the United States needs to be complemented by a policy that would preserve other selected rivers or sections thereof in their free-flowing condition . . . .<sup>1</sup>

The original impetus for enactment of the Wild and Scenic Rivers Act of 1968<sup>2</sup> is thus phrased in the preface of the Act. However, the legislation became more than a counterweight to federal dam-building programs; it is also an effort to limit the development of certain rivers and their banks in the name of recreation.<sup>3</sup> If the Act succeeds in its purpose, it may serve as a model for future limited-development legislation to protect other segments of the environment.

## I

### THE ORIGINS OF THE LEGISLATION

The era of the high dam and large reservoir began early in the twentieth century. Out of the progressive period presided over by Pres-

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<sup>1</sup> Wild and Scenic Rivers Act § 1(b), 16 U.S.C. § 1271 (Supp. IV, 1969).

<sup>2</sup> *Id.* §§ 1271-87.

<sup>3</sup> Those who want more resources allocated to recreation range from those who would like most areas preserved in their pristine state to those who would manage areas on a turnstile basis to maximize the number of users. See Margolis, *Our Country 'Tis of Thee, Land of Ecology*, *ESQUIRE*, March 1970, at 124, for a readable roadmap to the various positions among the "new" conservationists. The Wild and Scenic Rivers Act represents an intermediate position; according to the category of river, recreational development will be allowed, but will be limited to that which will not substantially alter the character of the river corridor and its ecosystems at the time of inclusion within the system. In terms of the Outdoor Recreation Review Commission's six-fold classification scheme for areas—high density, general outdoor, historic and cultural sites, natural environment, unique natural, and primitive—the legislation indicates a clear preference for recreational development consistent with only the last three categories. We have adopted the term "limited development" to characterize the general purpose of the legislation. See generally Lawson & Knetsch, *Outdoor Recreation Research: Some Concepts and Suggested Areas of Study*, 3 *NATURAL RESOURCES J.* 250 (1963).

ident Theodore Roosevelt came two important concepts that shaped this century's natural resources policy.<sup>4</sup> These were the idea of systematic and efficient resource development<sup>5</sup> and the idea of government financing and construction of large-scale water developments.<sup>6</sup> From these concepts emerged the theory of multiple-purpose resource development—comprehensive river basin development achieved by impounding large amounts of water for flood control, irrigation, and water supply—which was the cornerstone of public natural resources policy until the past decade.

In the 1930's the ravages of floods and droughts and a political climate favoring public development of hydroelectric power caused the damming of rivers for the public benefit to assume major proportions. Federal agencies were soon faced with a demand for more projects than they could handle; in response, they began to develop project evaluation formulas, which marked the emergence of professional resource planning. In 1934 the National Resources Board recommended that as a rule federal funds "will be contributed to a project . . . only where the benefit from flood protection will justify the expense of such flood protection."<sup>7</sup> This was made law by Congress in the Flood Control Act of 1936,<sup>8</sup> and became recognized as federal policy in all phases of water resource development.<sup>9</sup>

Cost-benefit calculations were unsatisfactory in several respects. The Bureau of Reclamation and the United States Army Corps of Engineers consistently overestimated project benefits and underestimated project costs; as a result, massive federal subsidies were often

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<sup>4</sup> For a general survey of twentieth century conservation history, see Griffith, *Main Lines of Thought and Action*, in *PERSPECTIVES ON CONSERVATION* 3 (H. Jarrett ed. 1958).

<sup>5</sup> In his important history, Samuel P. Hays argues convincingly that the conservation movement "above all, was a scientific movement . . . Its essence was rational planning to promote efficient development and use of all natural resources." S. HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT 1890-1920*, at 2 (1959). Hays emphasizes that "apostles of the gospel of efficiency subordinated the aesthetic to the utilitarian. Preservation of natural scenery and historic sites . . . remained subordinate to increasing industrial productivity." *Id.* at 127.

<sup>6</sup> See, e.g., Reclamation Act of 1902, 43 U.S.C. §§ 372-616 (1964).

<sup>7</sup> NATIONAL RESOURCES BD., *REPORT ON NATIONAL PLANNING AND PUBLIC WORKS* 28 (1934).

<sup>8</sup> 33 U.S.C. §§ 701a-f, h (1964).

<sup>9</sup> The two basic federal documents are FEDERAL INTER-AGENCY RIVER BASIN COMM., SUBCOMM. ON BENEFITS AND COSTS, *PROPOSED PRACTICES FOR ECONOMIC ANALYSIS OF RIVER BASIN PROJECTS* (1950) (commonly called "Green Book"), and PRESIDENT'S WATER RESOURCES COUNCIL, *POLICIES, STANDARDS, AND PROCEDURES IN THE FORMULATION, EVALUATION, AND REVIEW OF PLANS FOR USE AND DEVELOPMENT OF WATER AND RELATED LAND RESOURCES*, S. Doc. No. 97, 87th Cong., 2d Sess. (1962). Cost-benefit ratios, of course, are not binding on Congress.

presented as economically self-sufficient.<sup>10</sup> Worse, from an environmental standpoint, was that reliance on cost-benefit ratios drastically narrowed the perspective of the planner. The question became "is this project economically justified?" rather than "is this project the least costly of several alternatives?"<sup>11</sup> However, as cost-benefit analysis became increasingly refined by academic economists it occasionally enabled advocates of river preservation to challenge a development decision within its own frame of reference: rather than asserting simply that preservation is superior to development,<sup>12</sup> advocates could sometimes question the very efficiency of the project.<sup>13</sup> In many other instances, however, preservationists were frustrated, because cost-benefit analysis cannot account for such values as the worth of a natural ecosystem.<sup>14</sup>

Because cost-benefit mathematics was a game usually won by the dam builders, the opposition considered institutional alternatives. The

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<sup>10</sup> Some economists have charged that this practice "leads not merely to a changed distribution of income but to a lower level of overall economic production." J. HIRSHLEIFER, J. DE HAVEN & J. MILLIMAN, *WATER SUPPLY: ECONOMICS, TECHNOLOGY AND POLICY* 230 (1960). See also J. BAIN, R. CAVES & J. MARGOLIS, *NORTHERN CALIFORNIA'S WATER INDUSTRY* (1966).

<sup>11</sup> Gilbert White, for example, argues that in planning flood control reservoirs the Corps of Engineers has given too little thought to the economic efficiency of adjustments other than dams, such as flood plain zoning and other nonstructural measures. White's writings are summarized in White, *Optimal Flood Plain Management: Retrospect and Prospect*, in *WATER RESEARCH* 251 (A. Kneese & S. Smith eds. 1965). For an application of this criticism, see L. JAMES, *A TIME-DEPENDENT PROCESS FOR COMBINING STRUCTURAL MEASURES, LAND USE, AND FLOOD PROOFING TO MINIMIZE THE ECONOMIC COST OF FLOODS*, REPORT EEP-12, STANFORD UNIVERSITY INSTITUTE IN ENGINEERING-ECONOMIC SYSTEMS (1964).

<sup>12</sup> See Tarlock, Book Review, 19 *STAN. L. REV.* 895, 901 (1967).

<sup>13</sup> This was the case, for example, when it was proposed to dam both ends of the Grand Canyon to finance the Central Arizona Project. See Carlin, *The Grand Canyon Controversy: Lessons for Federal Cost-Benefit Practices*, 44 *J. LAND ECON.* 219 (1968).

<sup>14</sup> Economics cannot show us how to *do* anything in the sense that these words are commonly used; it is not a kind of intellectual cake-mix, complete with instructions for use. What economic theory does is to provide a *definition* of efficiency that at best can only help decision-makers to lessen avoidable errors about the future . . . .

Hammond, *Convention and Limitation in Benefit-Cost Analysis*, 6 *NATURAL RESOURCES J.* 195, 210 (1966) (emphasis in original). There is, of course, a cost to a preservation decision that can be calculated: the benefits derived from alternative uses of the resource. M. CLAWSON & J. KNETSCH, *ECONOMICS OF OUTDOOR RECREATION* 181 (1966). See generally J. KRUITLILA & O. ECHSTEIN, *MULTIPLE PURPOSE RIVER DEVELOPMENT* 234-64 (1958). The federal government's efforts to add an overlay of environmental analysis to the engineering and economic studies of water projects began with the Fish and Wildlife Coordination Act of 1934 and were somewhat strengthened by the 1946 amendments to the same Act. 16 U.S.C. §§ 661-66c (1964). For a discussion of how preservation values were treated by federal agencies prior to 1968, see Tippy, *Preservation Values in River Basin Planning*, 8 *NATURAL RESOURCES J.* 259 (1968).

first of these was the technique of controlling floods with small headwaters impoundments rather than with large storage reservoirs. Congress parried this thrust in 1954 by establishing the Soil Conservation Service small-dams program<sup>15</sup> as a complement to, rather than a replacement for, the high dam and big reservoir. Advocates of the unimpounded stream then turned to the park and recreation concept as an alternative to dam building. After some general discussion of the desirability of preserving free-flowing streams as public recreation resources,<sup>16</sup> Congress in 1964 interred an unpopular proposal for a flood control dam in Missouri by creating the Ozark National Scenic Riverways area under the administration of the National Park Service.<sup>17</sup>

Although expansion of outdoor recreation opportunities was the initial goal of scenic river preservation, ecological considerations began to emerge during the 1960's. In 1965 a study by the Secretaries of Agriculture and Interior recommended that several rivers be protected from dam construction. These streams, the initial national wild rivers system, possessed exceptional outdoor recreational values. The recommendation—introduced as a bill by Senator Church of Idaho—was primarily a no-dams concept,<sup>18</sup> and conservation organizations quietly criticized it for giving little or no attention to intrusions other than dams that could disturb a natural river environment. As the river preservation idea moved east of the Rockies<sup>19</sup> and into areas where streamside land was mostly in private ownership, the bill became more than a prohibition on dam building, but conservation organizations

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<sup>15</sup> Watershed Protection and Flood Prevention Act, 16 U.S.C. §§ 1001-07 (1964). See Morgan, *The Small Watershed Program*, 22 LAW & CONTEMP. PROB. 405 (1957).

<sup>16</sup> See OUTDOOR RECREATION RESOURCES REVIEW COMM'N, OUTDOOR RECREATION FOR AMERICA 177-78 (1962).

<sup>17</sup> 16 U.S.C. §§ 460m-m-7 (1964). This was not the first congressional recognition of the value of preserving the free flow of the stream. The Act of June 29, 1906, ch. 3621, § 2, 34 Stat. 626, gave the Secretary of the Army the power to issue revocable permits for the diversion of water from the Niagara River as long as it did not interfere with the navigability of the river or the scenic grandeur of Niagara Falls.

<sup>18</sup> S. 1446, 89th Cong., 1st Sess. (1965).

<sup>19</sup> Senators from West Virginia and Pennsylvania amended the bill to have streams in their states studied for possible inclusion in the wild rivers system. 112 CONG. REC. 525, 530 (1966) (motions by Senators Randolph of West Virginia and Clark of Pennsylvania). At the same time some western senators voiced varying degrees of opposition to the bill as it would affect rivers in their states. The major opposition came from public officials and private citizens in Wyoming who opposed inclusion of the Green River since it was the major source of unappropriated water in the state. See *Hearings on S. 1446 Before the Senate Comm. on Interior and Insular Affairs*, 89th Cong., 1st Sess., pt. 2, at 369-489 (1965). This did not mean there were no supporters of free-flowing streams in the West; rather, the interests that perceive and pursue the advantages of economic development of water resources are much better organized in the West.

still complained that the bill was vague as to the types of activities and developments that would be permitted along rivers in the national system.<sup>20</sup> They advocated a classification system for preserved rivers to perpetuate existing land use patterns in a stream valley.<sup>21</sup> Landowners and local governments depending on land taxes for revenue also criticized the broad land acquisition authority in the bill. Protests from the Rogue River area in Oregon resulted in an amendment on the Senate floor denying the government eminent domain authority in any local jurisdiction where more than half the river frontage was already in federal ownership.<sup>22</sup> The bill, as amended, was passed by the Senate in 1966, but died in the House Interior Committee.

When the Ninetieth Congress convened in 1967 Senator Church reintroduced the Senate-passed bill. Representative Saylor of Pennsylvania also reintroduced a bill from the previous Congress, entitled the "National Scenic Rivers Act."<sup>23</sup> While this bill nominated more streams for immediate preservation and for study than did the Senate bill, its most significant feature was a three-part classification system. In February, Interior Secretary Udall sent Congress a draft bill proposing a twofold classification of "wild" and "scenic" rivers.<sup>24</sup>

The major breakthrough came in April of 1967, when Representative Aspinall of Colorado, Chairman of the House Interior Committee, introduced yet another bill—the longest and most complex to date.<sup>25</sup> The Aspinall bill took a conservative approach to the number of "instant" scenic rivers: only four western streams would comprise the

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<sup>20</sup> Of the dozen or more national organizations favoring the legislation, particular mention should be made of the Izaak Walton League, the National Audubon Society, the Wilderness Society, and the Wildlife Management Institute. Professional staff representatives of these groups helped to draft revised versions of the bill, which were then introduced by Congressmen Saylor and Aspinall. Rather than criticize the Senate bill, the conservationists simply promoted the House bills.

<sup>21</sup> The concept was originated by the wildlife biologists Frank and John Craighead. *Hearings on S. 1446, supra* note 19, at 23-25.

<sup>22</sup> 112 CONG. REC. 523-24 (1966) (remarks of Senators Church and Morse).

<sup>23</sup> S. 119, H.R. 90, 90th Cong., 1st Sess. (1967); H.R. 14922, 89th Cong., 2d Sess. (1966).

<sup>24</sup> S. 1092, 90th Cong., 1st Sess. (1967).

<sup>25</sup> H.R. 8416, 90th Cong., 1st Sess. (1967). The Senate bill passed on August 8, 1967. Hearings before the House Interior Committee were held in March 1968, and the Committee reported on the bill in June. H.R. REP. NO. 1623, 90th Cong., 2d Sess. (1968). It was brought to the House floor on July 15 on a motion that required a two-thirds vote for passage. Objections were raised by several Congressmen whose districts encompassed rivers named in the bill, and the bill was withdrawn. See 114 CONG. REC. 21454-58 (1968). The Interior Committee revised the bill to meet the objections, and on September 12 the House passed the bill. The differences between House and Senate versions were quickly resolved, as Congress hurried toward adjournment, and the bill was sent to the White House on September 26. President Johnson signed it into law on October 2, 1968.

initial system. Additions to the system were to be made after careful study of future candidates.<sup>26</sup> Most of the administrative provisions of the Aspinall bill were carried into the eventual statute; subsequent changes generally involved the treatment of specific rivers or the language in the classification system.

The Wild and Scenic Rivers Act became law in October 1968.<sup>27</sup> The Act created an initial National Wild and Scenic Rivers System consisting of sections of eight rivers. Five are in the West, flowing across lands mostly in federal ownership. The other three are in the Midwest, each posing few land acquisition problems and enjoying strong local support for preservation management. The Act further earmarked twenty-seven rivers for further study and possible addition to the system in the future.

## II

### CRITERIA AND PROCEDURES FOR INCLUSION

The Act recognizes three types of rivers to which protection may be extended. Defined in language taken from the 1966 Saylor bill, these types are: (1) wild river areas, "vestiges of primitive America"; (2) scenic river areas, accessible by road but largely undeveloped; and (3) recreational river areas, readily accessible and somewhat developed.<sup>28</sup>

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<sup>26</sup> In these studies, the greatest attention would be given to land acquisition, land-use regulation, and the delineation of boundaries for scenic river areas pursuant to a six-fold classification system. The bill followed the Saylor bill in other respects, such as setting a timetable for submission of recommendations on the study group rivers and providing interim preservation for those placed in a study group. Restrictions on mining activities were stricter than those proposed in the Saylor bill, and a larger role was given to the states in decisions on study group rivers.

<sup>27</sup> 16 U.S.C. §§ 1271-87 (Supp. IV, 1969).

<sup>28</sup> (b) A wild, scenic or recreational river area eligible to be included in the system is a free-flowing stream and the related adjacent land area that possesses one or more of the values referred to in section 1271 of this title. Every wild, scenic or recreational river in its free-flowing condition, or upon restoration to this condition, shall be considered eligible for inclusion in the national wild and scenic rivers system and, if included, shall be classified, designated, and administered as one of the following:

(1) Wild river areas—Those rivers or sections of rivers that are free of impoundments and generally inaccessible except by trail, with watersheds or shorelines essentially primitive and waters unpolluted. These represent vestiges of primitive America.

(2) Scenic river areas—Those rivers or sections of rivers that are free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by roads.

(3) Recreational river areas—Those rivers or sections of rivers that are readily accessible by road or railroad, and that may have some development

Except that a river classified as "wild" receives special protection against mining, the particular classification of a river determines only the way in which the river area is administered.<sup>29</sup>

The Act contemplates periodic addition of rivers to the national system. There are four procedures for making such an addition: (1) a later act of Congress in response to a study of a river as directed by section 5 of the Act;<sup>30</sup> (2) a later act of Congress in response to a study subsequently requested by Congress;<sup>31</sup> (3) a later act of Congress in response to recommendations contained in a multiple-purpose river basin study; or (4) the Secretary of the Interior's approval of a governor's request to designate a state-administered river corridor as a unit of the national system.<sup>32</sup>

The 1968 Act designates twenty-seven rivers for further study; recommendations are to be submitted within ten years after enactment.

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along their shorelines, and that may have undergone some impoundment or diversion in the past.

*Id.* § 1273.

<sup>29</sup> *Id.* § 1281. The bill approved by the Senate in 1966 did not include a classification scheme, an omission which, according to Mr. Saylor, would "lead inevitably to an erosion of the beauty and wildness of the most unspoiled of the streams." 112 CONG. REC. 10043 (1966). Mr. Saylor's apprehensions were supported by the Senate committee's report, which stated that the bill was "not nearly as restrictive" as the Wilderness Act and pointed out that it would not limit timber harvesting and livestock grazing, nor would it prohibit the location of new mining claims. S. REP. NO. 792, 89th Cong., 1st Sess. (1965). Thus multiple use, though without dams, remained the objective. The Senate bill of 1967 included a wild and scenic category, but the distinction appeared to have little bearing on management policy. The Aspinall bill of that year proposed a six-fold classification of rivers. H.R. 8416, 90th Cong., 1st Sess. § 2(b) (1967). The House Interior Committee adopted the Saylor version, adding the observation that recreation development could be incompatible with natural preservation. Classification of a river in the wild category should therefore curb alteration in the names of recreation and of economic development alike. H.R. REP. NO. 1623, 90th Cong., 2d Sess. 10 (1968).

<sup>30</sup> 16 U.S.C. § 1276(b) (Supp. IV, 1969).

<sup>31</sup> *Id.* § 1275(a).

<sup>32</sup> *Id.* § 1273(a). This formula was arrived at after many revisions. The original administration bill directed the two Secretaries to consult with the appropriate governors "to ascertain whether a joint Federal-State plan is feasible" to preserve the various rivers listed in the study group. The Secretaries were to have full control, however, over the formulation of the recommendation to the President. In 1966 the Senate added language permitting a governor to make an independent recommendation to the President concerning a river in his state if the river ran through non-federal land. S. 1446, 89th Cong., 2d Sess. § 3(b) (1966). The Aspinall bill went a step further in accommodating state programs; it barred the Secretary from carrying out a study of a river named for study if the appropriate governor certified that the state would carry out the study and would recommend for or against inclusion in the national system. H.R. 8416, 90th Cong., 1st Sess. § 5(b)(ii) (1967). So long as the state did "in fact pursue said study with diligence" the Secretary could not direct the study. The House approved this version, but in conference with the Senate it was modified to provide for joint studies at a state's request.



Until 1973, section 7 protects these rivers against alteration by any project that requires a Federal Power Commission license, or funding or licensing by other federal agencies.<sup>33</sup> In essence, this provision gives the Secretary of the Interior or the Secretary of Agriculture a veto power until 1973 over proposals for dams or related developments on any of the twenty-seven study group rivers. The five-year protection period may be shortened if the appropriate Secretary completes a study and recommends that a river does not merit inclusion in the national system. The period may also be extended up to an additional three years after a favorable recommendation is made, to allow time for Congress to consider the report. During the study period, the public lands beside a named river are withdrawn from homestead entry and mineral development.<sup>34</sup>

Section 12 of the Act directs the two Secretaries and the heads of other federal agencies to review those portions of their plans, contracts, and policies that may affect lands adjacent to any of the study group rivers.<sup>35</sup> Particular attention is to be given to timber harvesting, road construction, and similar activities which "might be contrary to the purposes" of the Act.<sup>36</sup> This review is required in order to determine what actions should be taken to protect the rivers while they are in candidate status; it provides a means for dealing with scenic rivers for which there are reasonable alternative developments or the protection of which would require undetermined but substantial land acquisition. Hopefully, a study will resolve conflicts in the pre-legislative phase. Study managers are encouraged, though not required, to hold public hearings in the localities affected by particular proposals. This interim protection is much weaker than the protection against water resources projects in that the *project sponsor* is the sole judge of compatibility;<sup>37</sup> neither Secretary has a veto, as each has over water resources projects under section 7.

The format for presenting recommendations is set out in some detail.<sup>38</sup> Each proposal is reviewed by the Corps of Engineers, the Federal Power Commission, and other departments having a particular interest. Review is also made by the Secretary of Agriculture if the Secretary of the Interior makes the report, and vice versa. If land acqui-

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<sup>33</sup> 16 U.S.C. § 1278(b) (Supp. IV, 1969).

<sup>34</sup> *Id.* § 1280(b).

<sup>35</sup> *Id.* § 1283(a).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* § 1275(b).

sition is necessary, the governor of each state affected by a proposal also reviews it. The comments of these officials are appended to the report, and the whole, with every possible development alternative presumably on the record, is printed as a House or Senate document.

Section 5(d)<sup>39</sup> directs the dam-building bureaus to observe a similar regard for preservation. Every agency that submits a river basin and project plan report to Congress is required to "consider and discuss" potential additions to the wild and scenic rivers system. The objects of this mandate, other than the Interior and Agriculture Departments, are the Corps of Engineers and the various river basin commissions. These are the organizations that design and lead river basin studies and submit the resultant plans to Congress through the Water Resources Council.<sup>40</sup> The plans are used by Congress as a basis and reference for appropriations for specific projects, and a proposal for a scenic river corridor can be put in "project" form as easily as a proposal for a flood control dam.<sup>41</sup> The Act also links preservation studies to basin planning by calling for the coordination of reviews of the study group rivers with any planning for the same rivers being conducted under the Water Resources Planning Act of 1965.<sup>42</sup>

A river may be included in the national system of wild and scenic rivers if it meets the criteria of one of the classifications and is effectively protected under state law. Once a state has preserved a scenic river, there are two advantages to designating the stream a part of the national system. First, the prohibitions against federally sponsored or licensed development become applicable. The second advantage, perhaps of dubious merit in some cases, is the greater publicity attaching to any recreation area of "national" significance.

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<sup>39</sup> *Id.* § 1276(d).

<sup>40</sup> See Water Resources Planning Act, 42 U.S.C. §§ 1962-62d (Supp. IV, 1969). This Act created the inter-agency Water Resources Council, authorized the establishment of federal-state river basin commissions, and gave some legislative recognition to principles of water resources planning formulated by the executive branch. See S. Doc. No. 97, 87th Cong., 2d Sess. (1962). The Council has defined four types of planning, ranging from general framework studies to specific single-project plans. Wild and scenic river preservation has been assigned a definite place in the formulation of all types of water resources planning. See generally Hart, *Creative Federalism: Recent Trends in Regional Water Resources Planning and Development*, 39 U. COLO. L. REV. 29 (1966).

<sup>41</sup> See, e.g., 1 COORDINATING COMMITTEE, COMPREHENSIVE BASIN STUDY, WHITE RIVER BASIN, ARKANSAS AND MISSOURI 105 (1968). This report, prepared under leadership of the Corps of Engineers, recommends addition of the Buffalo and Eleven Point Rivers in Arkansas to the national scenic rivers system (while at the same time recommending a number of construction projects).

<sup>42</sup> 42 U.S.C. §§ 1962-62d (Supp. IV, 1969).

The procedure for designation in such cases originates with the governors of the states involved, who submit a request to the Secretary of the Interior. The Secretary's approval depends on his first finding that the river meets one of the classifications and that administration of the river will involve no federal expense. He may prescribe supplementary criteria, such as a commitment by the state that the bed of a navigable river will not be disturbed by mining.<sup>43</sup> The Secretary must also submit the request for review and comment by the Secretaries of Agriculture and the Army, the Chairman of the FPC, and the chief of any other federal agency that may have an interest. In this phase the Corps of Engineers and other construction agencies may again present development alternatives for the record. The Secretary is directed to consider comments received from the other agencies and to publish his decision in the Federal Register.

States may also administer a part of the national system through the recommendations formulated on any of the twenty-seven study group rivers. The Act permits a state to request a joint state-federal study of any one of these rivers and directs the appropriate Secretary to accede to such a request.<sup>44</sup> After the study, the Secretary shall determine the degree to which a state or its local governments might participate in the preservation and administration of a national system river. In a provision that originated with the Saylor bill, the Secretary of the Interior is directed to encourage states to include state and local stream preservation programs in their outdoor recreation plans.<sup>45</sup> Such encouragement may include grants from the Land and Water Conservation Fund.<sup>46</sup> The Secretary is also authorized to provide technical assistance and advice to states, local governments, and private interests, including non-profit organizations, who wish to establish wild, scenic, or recreational river areas. This provision may acquire more significance after 1973, when the Interior Department completes reviews of the twenty-seven study group rivers. At present, however, the review process absorbs all appropriations to the Department for studies under the Act.

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<sup>43</sup> The House-passed bill required states to prohibit mining in navigable waters. H.R. 18260, 90th Cong., 2d Sess. § 13(c) (1968). This provision was dropped in conference without explanation, and apparently without prejudice to the Secretary's ability to impose such a requirement in his discretion.

<sup>44</sup> 16 U.S.C. § 1276(c) (Supp. IV, 1969).

<sup>45</sup> *Id.* § 1282.

<sup>46</sup> *Id.* § 4601-5.

## III

## MANAGEMENT OF THE RIVER CORRIDOR

A. *Land Acquisition*

Section 6 of the Act provides for acquisition of land for a protective corridor. On the many rivers in the Far West that run through the public domain, land acquisition will probably be confined to scattered access areas, cabin sites, and resorts that would have a blighting effect on the river corridor. However, in the Eastern United States many potential system rivers now exhibit a high level of recreational development,<sup>47</sup> much of which would be inconsistent with the purpose of the Act were the rivers included. In some instances intensive use will preclude the river's being included within the system, but in others the federal government may feel that selective acquisitions of private land, some of which is developed, may suffice to bring the river up to the statutory standards for designation as a recreational, or perhaps scenic, river.

The possibility of widespread acquisitions troubled many Congressmen whose constituents saw the Act as a threat to their recreational sites. During the hearings, representatives from the Departments of Interior and Agriculture were sharply questioned about their land acquisition and management policies. Objecting Congressmen sought to limit the power of eminent domain delegated to the two Secretaries and to commit the two Departments to acquisition policies favorable to the maintenance of existing uses in order to maximize the opportunities for general recreation.<sup>48</sup>

Under the Act the government may take either fee simple titles or scenic easements. The basic policy question considered by Congress was what type of restrictions would be placed on the acquisition of each of these interests. Proposed restrictions generally took the form of acreage and distance limitations, and the final bill represented a compromise between broad and limited acquisition powers. In designating

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<sup>47</sup> For examples of such rivers, see *Hearings on H.R. 8416 Before the Subcomm. on National Parks and Recreation of the House Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. 136-37 (1968).

<sup>48</sup> The following statement of condemnation policy was offered by the Department of the Interior to please these Congressmen:

I know it is our intent that if you have one of these rivers established, and you find a summer home there, and it can be handled in a way that in the judgment of the Secretary it is not incompatible with the purpose of the river, the intent would be to leave it. We would not clean out everything.

*Id.* at 157 (statement of Dr. Edward C. Crafts, Director, Bureau of Outdoor Recreation).

the boundaries of the system the Secretaries are limited to an average of not more than 320 acres per mile on both sides of the river.<sup>49</sup> Section 6(a) limits fee simple acquisitions by any method to an average of 100 acres per mile on both sides of the river.<sup>50</sup> Scenic easements can be acquired for the rest of the acreage included within the boundaries.<sup>51</sup> Since acreage averages are calculated for the entire length of the river,<sup>52</sup> the Secretaries have the flexibility to vary the width of the corridor boundaries as circumstances dictate.<sup>53</sup>

There are two significant restrictions on the right to condemn property. If fifty percent of the acreage of the entire river area is owned by federal, state, or local government, fee titles may not be condemned, although scenic easements may be taken.<sup>54</sup> If the land is within a city, village, or borough, it cannot be condemned if the juris-

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<sup>49</sup> 16 U.S.C. § 1274(b) (Supp. IV, 1969). The two Secretaries may also exchange federal lands outside the system for nonfederal lands within the system. *Id.* § 1277(d). This will be a useful tool in the West. See 34 Fed. Reg. 15565, 15566 (1969) (development plan for Middle Fork Clearwater Wild and Scenic River Area). If land is condemned, § 1277(g)(1) permits the owners to continue to occupy it. The owner of "improved property for non-commercial residential purposes" and his spouse have the right to retain a life estate in the property for a maximum of 25 years. However, if the appropriate Secretary finds that "such use and occupancy is being exercised in a manner which conflicts with the purposes of this chapter," he may terminate the right of use by tendering the owner the fair market value of the remaining life estate. 16 U.S.C. § 1277(g)(2) (Supp. IV, 1969).

<sup>50</sup> 16 U.S.C. § 1277(a) (Supp. IV, 1969).

<sup>51</sup> The use of scenic easements to preserve the natural environment in the river corridor is a technique that is now coming into widespread use. At one time it was thought that the use of scenic easements might be hampered by the technical restrictions surrounding the common law of easements, covenants, and equitable servitudes. For example, it has been suggested that the courts might not recognize a scenic easement because the law does not recognize novel interests in land. See Cunningham, *Scenic Easements in the Highway Beautification Program*, 45 DENVER L.J. 168, 174-77 (1968). However, negative easements of view have been recognized in several states. See, e.g., *Petersen v. Freidman*, 162 Cal. App. 2d 245, 328 P.2d 264 (1958). Reported and unreported cases are collected and discussed in O. PLIMPTON, *CONSERVATION EASEMENTS: LEGAL ANALYSIS OF CONSERVATION EASEMENTS AS A METHOD OF PRIVATELY CONSERVING AND PRESERVING LAND* 6-8 (undated mimeo prepared for the Nature Conservancy, Washington, D.C.). One court has held that the legislature may authorize the condemnation of scenic easements. *Kamrowski v. State*, 31 Wis. 2d 256, 142 N.W.2d 793 (1966). The express authorization to acquire scenic easements contained in the Act should be read as a legislative decision to create new forms of property interests unencumbered by common law technical restrictions that have no present utility.

<sup>52</sup> *Hearings on H.R. 8416, supra* note 47, at 114. S. 119 and other House bills would have restricted condemnation to a maximum of 320 acres per mile. See *id.* at 128-29 for a comparison of the condemnation provisions in the House and Senate bills.

<sup>53</sup> See *id.* at 143.

<sup>54</sup> 16 U.S.C. § 1277(b) (Supp. IV, 1969). As previously mentioned, this restriction was placed in the legislation by Senator Morse of Oregon to protect landowners on the Rogue River, where the largest percentage of land on a river, 33%, is in private ownership.

diction "has in force and applicable to such lands a duly adopted, valid zoning ordinance that conforms to the purposes of this chapter."<sup>55</sup> The appropriate Secretary may issue guidelines for a zoning ordinance covering such matters as the prohibition of commercial and industrial uses and frontage and setback requirements. Although the wording of the statute is somewhat vague, the intent is to give the Secretary of the Interior the power to condemn if he does not approve a local governmental unit's zoning plan. This provision represents a victory for the government, for earlier drafts of the legislation would have prohibited any condemnation.<sup>56</sup> In our judgment the first limitation is highly undesirable, for it unduly constrains the government's power to preserve or enhance a river corridor consistent with its classification. Where there are large commercial uses, such as a resort, the fifty percent limitation may perpetuate a higher level of development than is optimal under the river's classification.<sup>57</sup>

## B. Corridor Management

### 1. Statutory Guidelines and Administrative Interpretations

The basic management philosophy of the Wild and Scenic Rivers Act is contained in the requirement that an included river be classified as one of the three types. Classification determines the intensity of shoreland development and the types of recreational uses permitted in the corridor;<sup>58</sup> requiring it is therefore a legislative attempt to ensure

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<sup>55</sup> *Id.* § 1277(c).

<sup>56</sup> See *Hearings on H.R. 8416, supra* note 47, at 128-29, for a comparison of the condemnation provisions in the House and Senate bills.

<sup>57</sup> Section 7 might be challenged on constitutional grounds, since the right of Congress to delegate the power of eminent domain is circumscribed by the fifth amendment requirement that the taking be for a public purpose. In light of a dictum in *Berman v. Parker*, 348 U.S. 26 (1954), however, it is unlikely that such a challenge would be sustained by the Supreme Court:

The concept of public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean . . . .

*Id.* at 33 (citation omitted). Justice Douglas's emphasis in *Berman* on the detailed planning procedure in the urban renewal statute involved there indicates that the Court may still review the manner in which delegated eminent domain power is to be exercised. The legislation appears satisfactory in this respect: Congress has chosen not to exercise the full scope of its power of eminent domain, but has put fairly rigid limits on the amount of land that can be taken and the purpose for which the power is to be exercised. Sufficient advance planning for each river is required so that the possibility of selective takings operating in an unconstitutionally discriminatory manner has been minimized.

<sup>58</sup> Segments of the same river may be in different classifications. The consequences of a three-fold classification scheme are illustrated by the Rogue River development plan. In the wild river area, demand for use will probably be greater than the area can accom-

that preservation values are not destroyed by supposed "compatible" uses.<sup>59</sup> Limitation is necessary, since there will be constant pressures for high-density recreational development and a wider range of permitted activities on even the more remote rivers as the lower, more developed reaches of streams included in the system are used to capacity.

The Act charges the two Secretaries to so administer river systems as to emphasize their "esthetic, scenic, historic, archeologic, and scientific features."<sup>60</sup> These guidelines are superimposed over more general delegations of management authority under which public lands are administered. Lands under the Secretary of Agriculture's jurisdiction are administered under "the general statutory authorities relating to the national forests in such manner as he deems appropriate to carry out

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modate and still retain its primitive character. Therefore, capacity will be limited to that which is consistent with the management objectives of the area. No more facilities will be provided than are necessary to accommodate the established capacity, even though there is more usable land available. On the other hand, the recreational scenic river areas have only limited amounts of land available for development. Demand will probably be greater than it is physically possible to provide facilities for.

In the wild river area, public camping spots will be developed which are of a primitive nature, are accessible only by trail or boat, and provide simple comfort and convenience facilities as well as facilities for the protection of the site and environment or the safety of the user. Scenic river area sites will provide for some user comfort along with site protection and safety. Sites in the recreational river areas will provide a wide range of recreation opportunities consistent with the objectives for these river areas. Some will be accessible only by trail or boat and provide facilities primarily for site protection, while others will be accessible by paved roads and provide for considerable user comfort and convenience. Campgrounds, picnic grounds, boat ramps, and facilities for public information and interpretation will all be provided in the recreational river areas.

<sup>59</sup> A useful discussion of the need to consider ecological considerations in development decisions similar to those which will be made under the Act is found in F. DARLING & N. EICHHORN, *MAN AND NATURE IN THE NATIONAL PARKS: REFLECTIONS ON POLICY* (2d ed. 1969).

<sup>60</sup> Each component of the national wild and scenic rivers system shall be administered in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values. In such administration primary emphasis shall be given to protecting its esthetic, scenic, historic, archeologic, and scientific features. Management plans for any such component may establish varying degrees of intensity for its protection and development, based on the special attributes of the area.

16 U.S.C. § 1281(a) (Supp. IV, 1969). A similar provision exists for lands within designated wilderness areas:

Any portion of a component of the national wild and scenic rivers system that is within the national wilderness preservation system [*Id.* § 1132], as established by or pursuant to the Wilderness Act [*Id.* §§ 1131-36 (1964)], shall be subject to the provisions of both the Wilderness Act and its chapter with respect to preservation of such river and its immediate environment, and in case of conflict between the provisions of the Wilderness Act and this chapter the more restrictive provisions shall apply.

*Id.* § 1281(b) (Supp. IV, 1969).

the purposes of this chapter."<sup>61</sup> The basic statute will thus be the Multiple-Use Sustained-Yield Act of 1960.<sup>62</sup> Lands administered by the Secretary of the Interior through the National Park Service become part of that system.<sup>63</sup> If the Wild and Scenic Rivers Act conflicts with a park system act, the more restrictive provision applies. If the land is not part of the national park system, the Secretary may administer it under "such general statutory authorities . . . available to him for recreation and preservation purposes and for the conservation and management of natural resources as he deems appropriate to carry out the purposes of this chapter."<sup>64</sup>

In light of experience with the Forest and Park Service enabling legislation, these provisions give the two Secretaries ample discretion to control the number of users and types of uses allowed in each of the three river categories.<sup>65</sup> In *McMichael v. United States*,<sup>66</sup> defendants were convicted of violating a Forest Service regulation that prohibited the use of motorbikes on trails in primitive areas of the national forests.<sup>67</sup> In sustaining the regulation the court held it to be a reasonable

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<sup>61</sup> *Id.* § 1281(d).

<sup>62</sup> *Id.* §§ 528-31 (1964). Prior laws are not, however, superseded.

<sup>63</sup> *Id.* § 1281(c) (Supp. IV, 1969).

<sup>64</sup> *Id.*

<sup>65</sup> Even though the courts refuse to alter administrative interpretations of enabling authority that have been crystallized into policy positions, the agency is generally free to change its position in light of new conceptions of its role. An example of the increased weight that can be given to ecological conditions is a recent opinion from the Department of the Interior authorizing the termination of a grazing permit in the Organ Pipe Cactus National Monument. Memorandum from the Solicitor to the Secretary of the Interior, Legality of Grazing Permits in Organ Pipe Cactus National Monument [M-36734], April 5, 1968. Cattle had been grazing in the area long before it was designated a national monument in 1937. At that time a wildlife specialist warned that the cattle were endangering the plant life of the monument, but a grazing permit was issued. Subsequent permits were made revocable at the discretion of Director of the National Park Service, but, despite constant complaints from naturalists about the adverse impact of the cattle on the monument, were routinely renewed. Finally, in 1965, ecologists bluntly told the Park Service "that the point of irreversible alterations to the Sonoran ecosystem is dangerously near and could not be satisfactorily forestalled simply by a reduction in the number of animals grazing." *Id.* at 11. Prior departmental policy was reversed, and the Solicitor advised the Park Service that it had not only the power but the duty to revoke the permit because the grazing was inconsistent with the primary purpose of the monument. Cases such as this raise complex estoppel problems beyond the scope of this article. See K. DAVIS, ADMINISTRATIVE LAW § 17 (1958).

<sup>66</sup> 355 F.2d 283 (9th Cir. 1965). See also *Jones v. Freeman*, 400 F.2d 383 (8th Cir. 1968) (recognizing an implied power to promulgate regulations to protect forest resources).

<sup>67</sup> See 28 Fed. Reg. 5617 (1963), amending 36 C.F.R. §§ 251.20-21(a) (1963). The regulation was enacted under 16 U.S.C. § 551 (1964), which authorizes the Secretary of Agriculture to "make such rules and regulations . . . as will insure the objectives of such reservations, namely, to regulate their occupancy and use and to preserve the forests



means of providing the public with a wilderness area and thus within the Secretary's discretion. "The choice of what shall be preserved is an administrative choice in which geographical and topographical considerations are certainly germane but hardly are subject to judicial review."<sup>68</sup>

If the Secretaries have the necessary power, the question remains whether they will exercise it wisely. If the scenic rivers are managed as general recreation areas, as some preferred during the hearings, the values for which they are preserved may be lost. For example, will boating, motor-boating, and water skiing be allowed on wild or scenic rivers?<sup>69</sup> Will overnight accommodations be allowed in recreational river areas? As a representative of the Bureau of Outdoor Recreation testified, "[t]he bill is very open on that."<sup>70</sup> Congressional reports are not precise, stating only that development should "be kept on the modest side."<sup>71</sup>

The best indication of the management policies that the federal government intends to follow in permitting stream uses and development along the banks is the testimony of the Director of the Bureau

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thereon from destruction . . . ." See also *United States v. San Francisco*, 310 U.S. 16, 29 (1940) ("The power over public land thus entrusted to Congress [under U.S. CONST. art. 4, § 3, cl. 2] is without limitations").

<sup>68</sup> 355 F.2d at 286. The Bureau of Land Management, which will administer the Rio Grande, "will exclude, except under certain prescribed conditions . . . the use of motorized equipment and aircraft within the boundaries of the Wild River Area." 34 Fed. Reg. 17207, 17209 (1969) (development plans for Rio Grande National Wild and Scenic River, New Mexico). See also *id.* at 15605, 15607 (development plan for Eleven Point Wild and Scenic River Area).

<sup>69</sup> Congressman Fraser of Minnesota suggested that powerboats and waterskiing might be allowed on a scenic but not a wild river. *Hearings on H.R. 8416, supra* note 47, at 83.

<sup>70</sup> *Id.* at 153. He also qualified his remarks:

Well, I think that the purposes are to preserve segments of America's rivers in as nearly a natural state as we can, but permitting a minimum type of recreation development—trails, boating, but generally in the wilderness areas they prohibit motorboats and also in a substantial portion of the Boundary Waters Canoe Area. In some places you would have to use motorboats for safety.

But I do not think you would have the extent of recreation development and facilities that you normally contemplate in a national recreation area. You would not have that.

You would not have overnight accommodations and this sort of thing. Hopefully, you would have this sort of development on private land outside.

You might have a simple type of picnic facilities, and this sort of thing. I think my figures indicate that the developments contemplated here run about a third of the cost of acquisition. The normal ratio between development and the cost of acquiring a recreation area is about 2 to 1.

What is contemplated for scenic river areas generally is a very simple type of development.

*Id.* at 165.

<sup>71</sup> H.R. REP. NO. 1623, 90th Cong., 2d Sess. 10 (1968).

of Outdoor Recreation before the Subcommittee on National Parks and Recreation of the House Interior Committee:

From a scenic river standpoint emphasis would be placed on providing principally those facilities that are oriented to active visitor use and enjoyment of the river. This would include such facilities as access points, campsites, picnic areas, and interpretive areas. In the case of rivers flowing through areas in which the natural scene has remained unchanged, development would be minimal to retain the integrity of the natural state. In those instances where the rivers flow through designated wilderness areas no development will be permitted unless expressly allowed by the Wilderness Act. Wherever possible visitor goods and services would be provided outside the boundaries of the rivers by private initiative in the nearby communities.

Existing farm and ranch operations normally would be consistent with the scenic river concept. Likewise, existing well managed timber operations would be compatible, except that clear-cutting of trees on the river edge may in some instances be too disruptive to the natural scene. Existing mineral activities would be compatible except where they tend to destroy esthetic qualities or pollute the river. Existing cabins, summer homes and other recreation oriented commercial developments may be compatible with scenic river objectives if they do not seriously detract from the esthetic features and qualities of the river.

Certain uses would be discouraged that are disruptive to the natural or pastoral river scene such as residential sub-divisions, industrial plants, motels, and gas stations. The construction of dams, river channelization, closely paralleled roads and utility lines would be discouraged unless compelling reasons exist why they should be permitted.<sup>72</sup>

To date, published management plans have been consistent with these standards. For example, outboard motors will be restricted in the Eleven Point Wild and Scenic River, and, in the Middle Fork Clearwater Wild and Scenic River, "visitor use will be distributed or limited as necessary to prevent loss of river values."<sup>73</sup>

## 2. *Judicial Review of Corridor Management Decisions*

The Act is silent on the question of whether judicial review of internal departmental management decisions can be obtained. It has

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<sup>72</sup> *Hearings on H.R. 8416, supra* note 47, at 165.

<sup>73</sup> 34 Fed. Reg. 15605, 15607 (1969) (development plan for Eleven Point Wild and Scenic River Area); *id.* at 15565, 15566 (development plan for Middle Fork Clearwater Wild and Scenic River Area). Development plans for the other "instant" rivers in the wild and scenic rivers system can be found in *id.* at 17206 (Rio Grande), *id.* at 15572 (Salmon), and *id.* at 15306 (Wolf and Saint Croix).

been thought that there is no need to provide for judicial review of decisions such as these because the public interest is represented by the government. But the performance of the federal government in arresting environmental degradation suggests that non-governmental checks on decision making are necessary, and citizen groups may have a useful role to play in monitoring the administration of the Wild and Scenic Rivers Act. The potential effectiveness of citizen participation is enhanced because the Act attempts to set standards for the exercise of discretion. The historic practice of allowing administrators to formulate substantive policies within broad statutory guidelines has not been followed. It should be possible for the courts to develop criteria from the legislation under which administrative decisions can be reviewed, thus removing a previous constraint on judicial review of internal public land management decisions.

If legislation does not provide for judicial review, it may be obtained for action which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . ." except where "agency action is by law committed to agency discretion."<sup>74</sup> Some decisions suggest that the courts might apply this exception to the Act.<sup>75</sup> But judicial review may be more readily available than under this standard; as a result of *Abbott Laboratories v. Gardner*,<sup>76</sup> courts are beginning to hold that there is a presumption of jurisdiction under the Administrative Procedure Act, a presumption which can be overcome only by a clear showing that Congress did not intend to allow judicial review.<sup>77</sup> This presumption is now being extended to government resource management decisions where the authorizing statute provides no specific provision for judicial review.<sup>78</sup> We believe that the Wild and Scenic

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<sup>74</sup> Administrative Procedure Act § 10, 5 U.S.C. §§ 701, 706 (Supp. IV, 1969).

<sup>75</sup> See, e.g., *Frost v. Garrison*, 201 F. Supp. 389 (D. Wyo. 1962). See also Reich, *The Public and the Nation's Forests*, 50 CALIF. L. REV. 381, 393-96 (1962). A possible barrier to the review of corridor decisions is the doctrine of sovereign immunity. For an excellent discussion of its application, see Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 389, 396-436 (1970). But see *Plaintiffs' Brief in the Project Rulison Case*, 55 CORNELL L. REV. 761, 786-802 (1970).

<sup>76</sup> 387 U.S. 136 (1967). For a discussion of the implications of this case for original lawsuits initiated by citizens groups, see Sax, *Public Rights in Public Resources: The Citizen's Role in Conservation and Development*, in UNIVERSITY OF TEXAS LAW SCHOOL WATER LAW CONFERENCE: CONTEMPORARY DEVELOPMENTS IN WATER LAW (C. Johnson & S. Lewis eds. 1970).

<sup>77</sup> See *Cappadora v. Celebrezze*, 356 F.2d 1 (2d Cir. 1966); *Road Review League, Town of Bedford v. Boyd*, 270 F. Supp. 650 (S.D.N.Y. 1967).

<sup>78</sup> Citizens Committee for the Hudson Valley v. Volpe, 302 F. Supp. 1083 (S.D.N.Y. 1969). A most significant decision in this direction is *Parker v. United States*, 309 F. Supp.

Rivers Act should be construed to create enforceable public rights and thus permit judicial review of corridor management decisions.

Assuming that judicial review of management decisions is possible, who has standing to seek such review? Until 1966 courts held that groups of private citizens had no standing because they had no legally protected rights under federal statutes.<sup>79</sup> Since *Scenic Hudson Preservation Conference v. FPC*,<sup>80</sup> however, courts have begun to hold that citizen groups have standing to protest the application of federal statutes when there is a threat of environmental degradation.<sup>81</sup> *Scenic Hudson* held that under a section of the Federal Power Act requiring the Federal Power Commission to consider the impact of projects on the recreational potential of rivers, a non-profit organization consisting of conservation groups and towns in the vicinity of a planned project was an aggrieved party. The groups in *Scenic Hudson* were parties to the licensing proceeding, but *Scenic Hudson* was extended in *Road Review League, Town of Bedford v. Boyd*<sup>82</sup> to give a similar group of

593 (D. Colo. 1970). A group of citizens brought suit to prevent the Forest Service from selling timber on land adjacent to a designated primitive area on the grounds that the land had not been studied for possible inclusion in the wilderness system. The court reasoned that the Wilderness Act, 16 U.S.C. § 1132(b) (1964), "leaves no doubt that at least as to those contiguous areas which are predominantly of wilderness value, the decision to classify or not to classify them as wilderness must remain open through the Presidential level." 309 F. Supp. at 598 (emphasis in original). To implement this statutory policy the court held that the question of which areas were suitable for wilderness classification and must be studied under the Act was a question of law and thus subject to judicial review. The timber sale was enjoined pending completion of a study. The court rested its decision on the theory that the "substantially objective criteria" contained in the Wilderness Act removed "a great deal of . . . discretion from the Secretary of Agriculture and the Forest Service" (*id.* at 597), and provided a set of standards for the exercise of judicial review. The opinion provides a strong precedent for use of the river classification and land management criteria as standards for judicial review of corridor development decisions. See generally Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 863, 1005, 1263 (1962).

The *Parker* rationale may be limited to cases in which a court decides it is necessary to move the problem from one decisional authority to another. See Sax, *The Public Trust Doctrine In Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473, 556-65 (1970). If it is recognized, however, that the function of the courts in these types of natural resource decisions is to provide the public with a means by which they can monitor important, but little publicized, government decisions, *Parker* will be read to apply to the administration of acts such as the Wild and Scenic Rivers Act of 1968.

<sup>79</sup> See, e.g., *Green St. Ass'n v. Daley*, 373 F.2d 1 (7th Cir.), cert. denied, 387 U.S. 932 (1967).

<sup>80</sup> 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966).

<sup>81</sup> Courts seem to be moving rapidly to an acceptance of Professor Jaffe's position that the existence of a Hohfeldian claim has no relation to the case or controversy requirement or the political question doctrine. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968).

<sup>82</sup> 270 F. Supp. 650 (S.D.N.Y. 1967).

plaintiffs standing to bring an independent action under the Federal Highways Act.

*Scenic Hudson* and *Road Review League* may not solve all problems of standing, since plaintiffs in those cases were parties from the locality of the project. *Scenic Hudson* held that "those who by their activities and conduct have exhibited a special interest in such areas" have standing;<sup>83</sup> the court found that the towns had a direct economic interest because transmission lines connected with the project might reduce tax revenues, and that a hiking conservation group had an interest because it might lose the use of trails it owned in the area. The remoteness of many wild and scenic rivers makes it unlikely that local groups will be formed to challenge the management of an area under the Act. Litigation is most likely to be instigated by state or national conservation groups who cannot always demonstrate a prior interest in the affected area.

In *Citizens Committee for the Hudson Valley v. Volpe*,<sup>84</sup> the court held that the Sierra Club, a national conservation organization that had "no personal economic claim to assert," had standing. On the basis of *Scenic Hudson* and *Road Review League*, the court concluded:

The rule, therefore, is that if the statutes involved in the controversy are concerned with the protection of natural, historic, and scenic resources, then a congressional intent exists to give standing to groups interested in these factors and who allege that these factors are not being properly considered by the agency.<sup>85</sup>

This is a correct reading of *Scenic Hudson*. Judge Hays's statement that "although a 'case' or 'controversy' which is otherwise lacking cannot be created by statute, a statute may create new interests or rights and thus give standing to one who would otherwise be barred by the lack of 'case' or 'controversy,'" <sup>86</sup> indicates that standing is a function of the purpose of the statute rather than the impact of the decision on the party bringing the suit. The broad rationale of *Scenic Hudson* is that those with a serious concern with environmental quality have a useful role to play in resource management decision making.

Future courts may use the constitutional requirement of a case or controversy to screen non-local challenging groups, but not in the traditional way. The standard developed in *Scenic Hudson* and the statement in *Citizens Committee* that groups "interested" in conserva-

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<sup>83</sup> 354 F.2d at 616.

<sup>84</sup> 302 F. Supp. 1083 (S.D.N.Y. 1969).

<sup>85</sup> *Id.* at 1092 (footnote omitted).

<sup>86</sup> 354 F.2d at 615.

tion have standing suggest that courts will require an evidentiary showing on such questions as the history of a group's involvement in environmental problems, the range and depth of its concerns and activities, and its ability to bring significant new data and alternative proposals to the attention of the decision maker.<sup>87</sup> The emphasis in questions of standing should be on the group's general sophistication in matters of environmental quality. Judging from the experts who have been allowed to testify in these cases, however, it seems probable that *Scenic Hudson* will be read to allow national conservation groups with no prior knowledge of the specific area to challenge a decision made under the Act.

### C. Mining Limitations

Section 9 provides, with certain exceptions, that the Act does not limit the application of the mining and mineral leasing laws.<sup>88</sup> The mining laws allow any American citizen who discovers valuable mineral deposits on the public domain to locate and patent his claim and acquire title to the minerals.<sup>89</sup> Other resources, such as oil and gas, may be extracted from the public domain under provisions of the mineral leasing laws.<sup>90</sup> Claims may also be located on national forest lands that were reserved from the public domain.<sup>91</sup> Thus a western river that passes through the public domain or national forests may be subjected to mining development even after inclusion in the na-

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<sup>87</sup> See *South Hill Neighborhood Ass'n v. Romney*, 38 U.S.L.W. 2413 (6th Cir. Nov. 24, 1969). An association was formed to protest an urban renewal project that would destroy historic buildings in the center of Lexington, Kentucky. The buildings had been placed in the National Register of Historic Places six months after the urban renewal authority acquired title to the buildings. Finding that "[n]one of the plaintiffs, though informed of the urban renewal plan's alternative use for historic preservation, submitted a proposal for the development of the area," the court denied standing to contest the demolition. "The plaintiffs have not sufficiently engaged in the administrative process to show a special interest in the controversy so as to be included among those parties aggrieved or adversely affected by agency action." *Id.* The case seems to deny standing not because of the status of the parties, who were residents of the area, but because of the quality of their participation in decision making. The burden to come forward with alternative development plans is a logical one to apply in a case such as *South Hill* because most historic preservation schemes flounder on the issue of finding economically feasible uses for the buildings. It should not, however, be required in a corridor development challenge, since the Wild and Scenic Rivers Act should be read to contain a presumption against intensive development. Thus it should be sufficient to allow qualified plaintiffs to question the need for the development in light of probable adverse impacts on the ecological balance in the corridor.

<sup>88</sup> 16 U.S.C. § 1280 (Supp. IV, 1969).

<sup>89</sup> 30 U.S.C. § 26 (1964).

<sup>90</sup> See, e.g., *id.* § 228.

<sup>91</sup> 16 U.S.C. § 482 (1964).

tional system. The most important exception to this rule is the complete withdrawal from mineral development of lands within one-quarter of a mile of the bank of any river designated for management under the wild category. Classification of a river can thus be an administrative decision of great economic and environmental importance.

On scenic and recreational rivers, and beyond a quarter-mile from the bank of a wild river, the Act provides that claims perfected and leases let in a river corridor after its inclusion in the system may be operated subject to regulations designed to protect the natural values of the river. Prior claims and leases are not subject to such regulation. When they appear, the regulations will probably resemble mining restrictions applicable to national wilderness areas under the 1964 wilderness legislation,<sup>92</sup> which cover such matters as access routes, tree removal, drainage provisions, and post-mining restoration.<sup>93</sup>

#### IV

#### RESTRICTIONS ON FEDERAL WATER RESOURCES PROGRAMS INCONSISTENT WITH THE ACT

A common criticism of our natural resources management agencies is that neither their historic missions nor their current organizational structures are conducive to increased consideration of the ecological impact of important management decisions. Lack of coordination among federal agencies<sup>94</sup> and the development bias of federal programs have combined to ensure that preservation values have been insufficiently

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<sup>92</sup> *Id.* §§ 1131-36; 36 C.F.R. § 251.83 (1969).

<sup>93</sup> It does not appear that these regulations could directly prevent the use of disruptive techniques, such as open-pit mining. See Hubbard, *Ah, Wilderness! (But What About Access and Prospecting?)*, 15 ROCKY MT. MINERAL L. INST. 585 (1969); Comment, *The Wilderness Act and Mining: Some Proposals for Conservation*, 47 ORE. L. REV. 447, 452-58 (1968).

<sup>94</sup> Existing coordination agencies are deficient because

[n]one of these bodies are [sic] constituted to look at man-environment relations as a whole; none provide [sic] an overview; none appear [sic] fully to answer the need for a system to enable the President, the Congress, and the electorate to consider alternative solutions to environmental problems.

*Joint House-Senate Colloquium To Discuss a National Policy for the Environment, Hearings Before the Senate Comm. on Interior and Insular Affairs and the House Comm. on Science and Astronautics*, 90th Cong., 2d Sess. 104 (1968). See S. REP. NO. 296, 91st Cong., 1st Sess. 15-17 (1969), and 115 CONG. REC. S 1780-1794 (daily ed. Feb. 18, 1969) (remarks of Senator Jackson on S. 1075), for a perceptive discussion of deficiencies in existing agency structure and practice. The history of attempted coordination of federal water resources activities is described in Fesler, *National Water Resources Administration*, 22 LAW & CONTEMP. PROB. 444 (1957).

represented in water resources planning and programs. For example, the Federal Power Commission has the power to deny a license for a dam if fish, wildlife, or scenic values are threatened, but the power has been exercised only once.<sup>95</sup> The United States Army Corps of Engineers has recognized preservation values only when local political pressure has been organized against a dam.

The National Environmental Policy Act of 1969<sup>96</sup> is a partial response to this criticism. The Act states federal environmental policy as reflecting "the continuing responsibility of the Federal Government to use all practical means, consistent with other essential considerations of national policy, to . . . enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources."<sup>97</sup> It then attempts to enforce this and other policy statements by requiring that "to the fullest extent possible" federal laws and administrative policies shall be interpreted in a manner consistent with the Act.<sup>98</sup> The Act will be administered by presidential appointees from within the government, especially from the Department of the Interior, who have shown a high level of interest in limiting development of selected natural areas. Hopefully, precise policy standards will force federal agencies to modify programs that contribute to environmental degradation.

In the Wild and Scenic Rivers Act, Congress attempted to ensure preservation of included rivers by restricting projects and programs that are inconsistent with the Act.<sup>99</sup> Senate drafts of the legislation simply

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<sup>95</sup> *Namekagon Hydro Co. v. FPC*, 216 F.2d 509 (7th Cir. 1954). The Department of the Interior's Bureau of Sport Fisheries and Wildlife has often appeared in FPC licensing hearings, but its recommendations are not binding on the Commission. See Tarlock, *Preservation of Scenic Rivers*, 55 Ky. L.J. 745, 769-83 (1967), for a discussion of conflicts between the Department of the Interior and the Federal Power Commission. For a discussion of the U.S. Army Corps of Engineers, see Tippy, *supra* note 14, at 262-64.

<sup>96</sup> 42 U.S.C.A. §§ 4321-47 (Supp. March 1970).

<sup>97</sup> *Id.* § 4331(b)(6).

<sup>98</sup> Specifically, federal legislative proposals and "other major Federal actions" must include a statement on (1) the environmental impact of the proposal, (2) any adverse environmental impacts which cannot be avoided, (3) alternatives to the proposed action, (4) the relationship between the short-term uses of the environment and the maintenance and enhancement of long-term productivity, and (5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action. *Id.* § 4332.

<sup>99</sup> 16 U.S.C. § 1278 (Supp. IV, 1969). The relationship between reorientation of any agency's mission and organizational restructuring has been concisely stated by political scientist L. K. Caldwell: "[T]he task of coordination has little significance beyond considerations of economy and efficiency, unless undertaken against a more explicit and authoritative standard for social goals." Caldwell, *Administrative Possibilities for Environmental Control*, in *FUTURE ENVIRONMENTS OF NORTH AMERICA* 666-67 (F. Darling & J. Milton eds. 1966).



prohibited the Federal Power Commission from licensing a "dam or other project work . . . in any wild river area except as specifically authorized by the Congress."<sup>100</sup> A much more comprehensive moratorium on federal construction and licensing activity was included in Congressman Aspinall's 1967 bill;<sup>101</sup> with one important provision added in conference, this restriction appears in the legislation as enacted.

The Aspinall revision, section 7 of the Act, protects "instant" rivers, future additions, and section 5 "study" rivers.<sup>102</sup> The Federal Power Commission is prohibited from licensing the construction of "any dam, water conduit, reservoir, powerhouse, transmission line, or other project works under the Federal Power Act, as amended, on or directly affecting" a section 3 or 5 river. Other federal departments, such as the Corps of Engineers, are prohibited from licensing or funding "any water resources project that would have a direct and adverse effect on the values for which such river" was or might be designated under section 3 or 5.<sup>103</sup> The appropriate Secretary is entitled to sixty

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<sup>100</sup> S. 1446, 89th Cong., 1st Sess. § 5(a) (1965). The necessity of imposing a moratorium on Federal Power Commission licenses is underscored by a 1968 report prepared by the Commission for the House Interior Committee, which listed 25 potential conventional hydroelectric sites on "instant" and 53 on potential streams. H.R. REP. No. 1623, 90th Cong., 2d Sess. 49 (1968).

<sup>101</sup> H.R. 8416, 90th Cong., 1st Sess. § 7(a) (1967).

<sup>102</sup> 16 U.S.C. § 1278 (Supp. IV, 1969).

<sup>103</sup> The term "water resources project" is not defined in the Act or the legislative history, but the Interior Department has construed it broadly. The Corps of Engineers has denied a dredge-and-fill permit that would have substantially altered the banks and flow of a § 5 "study" river at the request of the Interior Department. Based on the policy of the legislation and § 15(b), 16 U.S.C. § 1286(b) (Supp. IV, 1969), which defines a free-flowing stream as "existing or flowing in natural condition without impoundment, diversion, straightening, rip-rapping, or other modification of the waterway," the Department takes the position that "a water resource project can best be defined as any type of construction which would result in any change in the free-flowing characteristics of a particular river." Memorandum, U.S. Department of Interior, Act of October 2, 1968, Wild and Scenic Rivers Act [M-36777], February 7, 1969, at 5. See also *Hearings on H.R. 8416*, *supra* note 47, at 115 (sewage treatment plant might be included within the phrase); H.R. REP. No. 1623, 90th Cong., 2d Sess. 40 (1968).

The significance of the secretarial veto can be appreciated in the light of past Corps-Interior conflicts over dredge-and-fill permits. Under the Fish and Wildlife Coordination Act of 1958, 16 U.S.C. § 662(a) (1964), the Corps is required only to consult with the Bureau of Sport Fisheries and Wildlife and the state wildlife administrator before issuing a permit. In 1967 the Interior Department sought to limit this power over permits. *Hearings on H.R. 25 Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 90th Cong., 1st Sess. 21, 479 (1967). While the Corps takes the position that it has the power to deny a permit for purely ecological considerations, a federal district judge has held that it does not. *Zabel v. Tabb*, 296 F. Supp. 764 (M.D. Fla. 1969).

days to make his determination. The impact of a proposed project on the system may thus be explored at the early stages of planning and design, before the water bureaucracy irrevocably commits itself.

It is not clear whether the secretarial veto applies only to projects within the boundary of a section 3 or 5 river or also applies to the nonincluded reaches and tributaries. After providing for the veto, the conference committee added the following sentence:

Nothing contained in the foregoing sentence, however, shall preclude licensing of, or assistance to, developments below or above a wild, scenic or recreational river area or on any stream tributary thereto which will not invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area . . . .<sup>104</sup>

The legislative history indicates that this sentence was added at the insistence of the then Secretary of Agriculture, Orville Freeman, to broaden his discretion in approving watershed projects such as small flood control, fish and wildlife, and rural water supply reservoirs.<sup>105</sup> He was concerned that if all projects having a direct effect on an included river were prohibited it would not be possible to distinguish compatible projects, such as a reservoir that could be operated to stabilize the flow of an included stream, from incompatible projects. It should also be noted that the Federal Power Commission's jurisdiction is expressly restricted on system rivers and their non-included reaches and tributaries. Thus, although the Act is somewhat vague, the intent of Congress seems to be not to limit the secretarial veto to projects within the boundary of a river area.<sup>106</sup> The clause allowing projects on non-included reaches and tributaries should be read as merely specifying the findings the Secretary must make to exercise his veto. He cannot veto a project merely because it would have a *direct* effect on a river area; he must also find that it "*will . . . invade*

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<sup>104</sup> 16 U.S.C. § 1278(a) (Supp. IV, 1969).

<sup>105</sup> H.R. REP. No. 1623, 90th Cong., 2d Sess. 32-33 (1968).

<sup>106</sup> This problem was considered in the House when the legislation was passed, but it was not resolved. Representative Aspinall explained that the clause "is to prevent the blocking of development that does not adversely affect the scenic river segment when that development is above or below the designated scenic river area," but failed to state who would decide if the project would have an adverse impact on the river area. 114 CONG. REC. 26594 (1968).

The Interior Department naturally takes the position that it has a veto over projects outside the designated area. Memorandum, *supra* note 103, at 7. Congress is not, however, precluded from authorizing projects outside the boundaries of the scenic river, and judging from the House debates, it does not consider the Act as a significant self-imposed constraint on authorizing future projects such as flood control reservoirs. 114 CONG. REC. 26593-95 (1968).

... or unreasonably diminish" the scenic, recreation, and wildlife values of the area.

The Wild and Scenic Rivers Act may have consequences for water resources planning even on rivers not directly protected. Section 5(d) of the Act, which directs all federal agencies to consider preservation of a river as an alternative to other proposed projects, is a statement of policy that may be enforced not only through comprehensive planning, but also by the judiciary. In *Scenic Hudson Preservation Conference v. FPC*<sup>107</sup> the Second Circuit reversed the issuance of a pump storage plant license and remanded for further proceedings because the Commission's record on alternative sources of power was inadequate. Section 10(a) of the Federal Power Act requires the FPC to decide if the project

will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes . . . .<sup>108</sup>

The court held that section 10(a) imposed an affirmative duty on the Commission to give greater attention to alternative means, less destructive of fish, wildlife, and scenic beauty, of generating power. In *Udall v. FPC*<sup>109</sup> the Commission issued a license for a public utility over the objection of the Interior Department that the site should be reserved for future federal development because a federal dam would best be able to coordinate the use of a river for a variety of purposes, including preservation of salmon. The Court reversed the FPC and held that the Secretary of the Interior's request that the record be opened so he could make a factual showing of the superiority of federal development should have been granted. In a long dictum Justice Douglas questioned the need for any dam on the river—an issue raised by none of the parties. Relying in part on the 1965 Anadromous Fish Act,<sup>110</sup> he found the entire record insufficient on the question of whether the dam would be in the public interest. He specified that in reconsidering the license the Commission should consider "future power demand and supply, alternate sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the

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107 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966).

108 16 U.S.C. § 803(a) (1964).

109 387 U.S. 428 (1967).

110 16 U.S.C. §§ 757a-f (Supp. IV, 1969).

preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife."<sup>111</sup>

The net effect of these decisions is to increase substantially the burden of proof a development proponent is required to meet. Justification for shifting this burden of proof cannot be found in legislative intent; Congress has never attempted to decide whether administrative agencies are to prefer nondevelopment to development. The decisions must stem from a recognition that the planning being done by existing agencies is deficient. At the heart of current criticisms of the failure of government to arrest environmental degradation is the allegation that current planning is too narrow. Insufficient consideration is given to the broader impacts of decisions and to alternative solutions. *Udall* and *Scenic Hudson* compel an initiating agency to make a greater effort to consider the impact of a decision on other parts of the total statutory system, and, if conflict is found, to seek alternative solutions.

## V

### FEDERAL RIGHTS TO PROTECT THE FLOW OF THE RIVER AND CONTROL POLLUTION

#### A. *Application of the Reserved Rights Doctrine to Wild and Scenic Rivers*

The relationship between federal and state water law in the management of system rivers is set forth in sections 13(b)-(d) of the Act:

(b) Compensation for water rights.

The jurisdiction of the States and the United States over waters of any stream included in a national wild, scenic or recreation river area shall be determined by established principles of law. Under the provisions of this chapter, any taking by the United States of a water right which is vested under either State or Federal law at the time such river is included in the national wild and scenic rivers system shall entitle the owner thereof to just compensation. Nothing in this chapter shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.

(c) Reservation of waters for other purposes or in unnecessary quantities prohibited.

Designation of any stream or portion thereof as a national wild, scenic or recreational river area shall not be construed as a reservation of the waters of such streams for purposes other than those

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<sup>111</sup> 387 U.S. at 450.

specified in this chapter, or in quantities greater than necessary to accomplish these purposes.

(d) State jurisdiction over included streams.

The jurisdiction of the States over waters of any stream included in a national wild, scenic or recreational river area shall be unaffected by this chapter to the extent that such jurisdiction may be exercised without impairing the purposes of this chapter or its administration.<sup>112</sup>

By providing that federal rights are to be determined "by established principles of law," section 13(b) impliedly incorporates the line of Supreme Court cases holding that state law inconsistent with federal water programs may be supplanted by Congress.<sup>113</sup> A federal program subservient to state water law could readily be frustrated, for neither the common law of riparian rights nor the western doctrine of prior appropriation has had much regard for preservation of water for scenic uses.<sup>114</sup> The last two sentences of section 13(b) might suggest that state water law is to control the management of system rivers, but this is probably not the case: the second sentence merely provides for compensating the holder of state-created rights impaired by a project, while the final sentence is merely boilerplate, intended to have no operative consequences. On the other hand, section 13(c) is a left-handed assertion of the reserved rights doctrine, discussed below, and section 13(d) is a roundabout assertion of federal supremacy. Thus section 13 permits the federal government to administer wild and scenic rivers unfettered by inconsistent state law.

The extent to which the government must compensate those whose use of water is restricted by the establishment of a wild or scenic river will often depend on the application of the reserved rights doctrine, which holds that

upon the creation of a federal reservation on public domain—whether by treaty, legislation, or Executive order—the reservation has appurtenant to it the right to divert as much water from streams

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<sup>112</sup> 16 U.S.C. §§ 1284(b)-(d) (Supp. IV, 1969).

<sup>113</sup> *E.g.*, *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946).

<sup>114</sup> Generally speaking, preservation of a river for scenic purposes is not a reasonable riparian use. *See* F. MALONEY, S. PLAGER & F. BALDWIN, *WATER LAW AND ADMINISTRATION: THE FLORIDA EXPERIENCE* § 43 (1968). *But see* *Collens v. New Canaan Water Co.*, 155 Conn. 477, 234 A.2d 825 (1967). In the West, courts have held that the right to a portion of a river's flow cannot be appropriated for wildlife or recreational purposes because "appropriation" requires a diversion of water from the streams. *Colorado River Water Conservation Dist. v. Rocky Mountain Power Co.*, 158 Colo. 331, 406 P.2d 798 (1965). For a more extended discussion of the inadequacies of state law, see Tarlock, *supra* note 95, at 749-69.

within or bordering upon it as is necessary to serve the purposes for which the reservation was created. . . .

. . . .  
The reserved right, unlike state-created appropriative rights, does not depend upon diversion from the stream and application to beneficial use. The reserved right arises when the reservation is established even though the water right is not exercised for decades thereafter.<sup>115</sup>

The reserved rights doctrine derives from *Winters v. United States*,<sup>116</sup> in which the government sued to enjoin the construction and maintenance of dams on the Milk River in Montana on the ground that the dams would deprive an Indian reservation of the "riparian and other rights" of the United States to the uninterrupted flow of the river. The dams were to be built on land that was once part of the reservation but was sold to the United States by treaty in 1888 and opened for settlement. In 1898 defendants had entered on the land and diverted water. Because neither the United States nor the Indians had allegedly used the river's water before 1898, defendants argued that they had perfected superior rights. The Supreme Court rejected this argument and held that state-created rights perfected after the date of the reservation were inferior to the Indian rights, which dated from the 1888 treaty, even though the water might not be used until some distant date in the future.

The constitutional basis for such reservation of rights by Congress is somewhat obscure. In cases involving Indian reservations, the treaty power is a possible source.<sup>117</sup> It is clear, however, that the power is not limited to Indian reservations created by treaty. The Supreme Court upheld the doctrine in *Arizona v. California*<sup>118</sup> under "the broad powers of the United States to regulate navigable waters under the Commerce Clause and to regulate government lands under Art. IV, § 3, of the Constitution."<sup>119</sup> The Court ruled that the doctrine is applicable to national forests and recreation areas created by Executive order or congressional enactment, as well as to Indian reservations.<sup>120</sup> Although there are no cases in point, it has been argued persuasively that federal water rights should now apply to land purchased by the federal government as well as to land withdrawn by the government from the

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<sup>115</sup> Meyers, *The Colorado River*, 19 STAN. L. REV. 1, 65 (1966) (footnote omitted).

<sup>116</sup> 207 U.S. 564 (1908).

<sup>117</sup> See, e.g., *United States v. Winans*, 198 U.S. 371 (1905).

<sup>118</sup> 373 U.S. 546 (1963).

<sup>119</sup> *Id.* at 597-98.

<sup>120</sup> *Id.* at 601.

public domain.<sup>121</sup> The power to reserve water is thus applicable to the non-public domain states of the East and Midwest as well as to the public domain states.

A major deficiency in the Wild and Scenic Rivers Act is its failure to integrate reserved rights with state-created rights.<sup>122</sup> Congress left two important questions unanswered.<sup>123</sup> The first is the priority date of the reserved right: does it date from the original withdrawal of the public land from entry (or, in the case of non-public land, the original date of acquisition), or does it date only from the time a river is included within the system under section 3? The second question concerns the quantity of the withdrawal.<sup>124</sup>

A reserved right is generally held to date from the time of withdrawal of the land.<sup>125</sup> Thus an appropriation of water by a private landowner before use by the federal government but after the land has been withdrawn or acquired, which would create a vested right to the water under a state's prior appropriation doctrine, would not be superior to the government's reserved rights.<sup>126</sup> The cases, however, have not dealt with situations in which the use of water by the government differs substantially from uses that might have been foreseen when the land was purchased or withdrawn—as is the case with the Wild and Scenic Rivers Act. It is reasonable to expect one planning a water project “to suppose that Indian reservations were entitled to some irrigation water,”<sup>127</sup> but quite unreasonable to tell a water user on a wilderness river that the government has decided to exercise its reserved rights for a wild river and that he must abandon or limit his use without compensation.

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<sup>121</sup> Corker, *Water Rights and Federalism—The Western Water Rights Settlement Bill of 1957*, 45 CALIF. L. REV. 604, 612 (1957).

<sup>122</sup> In an appropriation state, all state-created water rights obtained after withdrawal of the land from entry are subordinated to the federal right. It has been suggested that under a riparian system rights exercised subsequent to the withdrawal should also be subordinated to the federal government. See Hanks, *Peace West of the 98th Meridian—A Solution to Federal-State Conflicts over Western Waters*, 23 RUTGERS L. REV. 33, 39-40 n.25 (1968). For a trenchant analysis of the difficulties of integrating reserved rights with state law outside the public domain appropriation states, see Meyers, *supra* note 115, at 65-73.

<sup>123</sup> There have been numerous congressional attempts to modify the reserved rights doctrine. See Morreale, *Federal-State Conflicts over Western Waters—A Decade of Attempted “Clarifying Legislation,”* 20 RUTGERS L. REV. 423 (1966).

<sup>124</sup> Rights perfected under state law prior to the date of the reservation are, of course, superior to reserved rights. *Hunter v. United States*, 388 F.2d 148 (9th Cir. 1967) (water right perfected by grazing cattle in Death Valley National Monument long before monument established).

<sup>125</sup> Meyers, *supra* note 115, at 66.

<sup>126</sup> *Id.* at 68.

<sup>127</sup> *Id.* at 72.

The special master in *Arizona v. California* approved a decree for quantities necessary to fulfill the purposes for which national forests and wildlife refuges were created.<sup>128</sup> Even if this is read as limiting relation back to uses consistent with the original purpose of the reservation, it might be argued that a scenic rivers system falls within a broad definition of the original purpose of many withdrawals—reservation of resources for public enjoyment. Such a result is undesirable because it jeopardizes state-created rights used over a long period of time. It seems clear that Congress did not intend to have wild and scenic river flowage rights relate back to the date the land was withdrawn or acquired, but it is not clear that state-created expectations will be protected under the Act. In response to a question about the effect of the legislation on state rights acquired before the legislation,<sup>129</sup> Representative Aspinall quoted from a Department of the Interior report, which stated: "Enactment of the bill would not in any way affect or impair any valid or existing water rights perfected under state law."<sup>130</sup> This is a reference to section 13(b), which provides that "any taking" of a right vested under state law must be compensated. But if the federal government's right relates back, subsequently created state rights may be diminished or destroyed without a "taking" under the reserved rights doctrine, for the government is only "exercising" its right. To further the intention of Congress, the courts should hold that reserved rights apply only to uses foreseeable at the time of the original withdrawal.<sup>131</sup> Establishment of a wild and scenic rivers system

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<sup>128</sup> 373 U.S. at 601. The open-ended decree was first approved in *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 341 (9th Cir. 1956). For a good discussion of the broad discretion a court has in fixing reserved rights, see Note, *Water in the Woods: The Reserved-Rights Doctrine and National Forest Lands*, 20 STAN. L. REV. 1187, 1189-93 (1968). The special master quantified the Indian rights on the basis of irrigable acreage. Professor Meyers reports that the master justified his refusal to quantify the rights for national forests, recreation areas, and fish and wildlife refuges because of "the lack of evidence of ultimate water requirements, but then somewhat inconsistently said that, in any event, the quantities were so small as to be *de minimis*, an observation that suggests that no great harm would have come to the Government if he had quantified the claims." Meyers, *supra* note 115, at 72.

<sup>129</sup> 114 CONG. REC. 26594 (1968).

<sup>130</sup> *Id.* The Interior Department report states that the bill

preserves the status quo with respect to the law of water rights, and makes clear that the designation of a stream or portion thereof as a scenic river area is not to be considered a reservation of waters for purposes other than those specified in the bill, or in quantities greater than necessary to accomplish these purposes.

H.R. REP. NO. 1623, 90th Cong., 2d Sess. 25-26 (1968).

<sup>131</sup> The amount of water to which the Indians are entitled does not depend on their needs at the time of the reservation. In one case the court said it could extend "to the ultimate needs of the Indians as those needs and requirements should grow to keep pace with the development of Indian agriculture upon the reservation." *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 327 (9th Cir. 1956). The case held, however, that



should be found unforeseeable, for only within the last few years has comprehensive preservation of a river's flow for scenic, recreational, and wildlife purposes been considered an appropriate federal objective.<sup>132</sup> The priority date should therefore be the date a stream is made either a section 3 or 5 river.

The only quantitative limitation on the government's power to reserve water is that the amount reserved must be no greater than required to accomplish the purposes of the Act. This is really no limitation at all, because the courts have not required that reserved rights be quantified in a suit to establish them. Open-ended decrees have been approved for national forests and wildlife areas, enabling the government to exercise its rights as the need for the water arises. Development plans for the rivers include provisions such as "[o]ptimum flows for environmental needs are to be reserved,"<sup>133</sup> but the Act provides no requirement or procedure for the quantification of these rights. The Departments of Interior and Agriculture have no present plans to quantify their flowage claims, but plan to protect them by enjoining diversions that, in their judgment, impair the management of the system.<sup>134</sup> This deficiency may impede state planning because the extent of future federal claims cannot be known. Even though unreserved water remains available under section 13(c), users have no way of determining the amount. This problem may not be particularly important, however, because the portions of the stream included in the system are generally in the upper reaches, so that reserved water will be available for downstream uses. Furthermore, unlike the case of Indian reservations, national forests, and other recreation areas, the amount of flow necessary to maintain the qualities of a river is likely to remain constant rather than expand over time. Thus, despite the unwillingness of the federal government to quantify the withdrawal, state development planning may not be unduly hampered by the Act.

### B. *Control of Water Pollution*

The Act contains only a brief and vague reference to the need for controlling water pollution in the wild and scenic river system. Section 12(c) directs the administrator of each river in the system to "cooperate

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a 1908 agreement approved by the Under Secretary of Interior and white users on the stream should be upheld.

<sup>132</sup> See Note, *supra* note 128, at 1197-99.

<sup>133</sup> 34 Fed. Reg. 15565, 15566 (1969) (development plan for Middle Fork Clearwater Wild and Scenic River Area).

<sup>134</sup> Telephone conversation with Bernard Meyer, Office of the Solicitor, U.S. Department of the Interior, Jan. 19, 1970.

with the Secretary of the Interior and with the appropriate State water pollution control agencies for the purpose of eliminating or diminishing the pollution of waters of the river."<sup>135</sup> More detailed legislation would have been inhibited by the committee jurisdictional problem for this legislation emerged from Interior and Insular Affairs rather than Public Works. In any event, control of the lands along a river in the system should suffice to prevent pollution by waste discharge from any point within a scenic river area. Should pollution emanate from points outside the boundaries of a national wild or scenic river, the United States would probably pursue its remedies as any other landowner would, under applicable state law.

### CONCLUSION

When a bureaucratic process runs out of control, the only cure may be to set another bureaucracy running in the opposite direction. Ideally, the first process should be revised to yield acceptable results. However, the national water resources development program was subjected to at least three distinct adjustments—the benefit-cost ratio, coordination with fish and wildlife agencies, and the small watersheds structural alternative—and still the large dam proposals threatened the best free-flowing streams. So a countervailing process of preservation was set in motion to restore balance to the policies on river use and management. To achieve this balance it was necessary to employ another controversial governmental process, *i.e.*, land acquisition authority. This process too has been adjusted and limited in a number of ways. The checks written into section 6 of the Wild and Scenic Rivers Act typify recent trends in recreation, highway, and urban renewal legislation away from broad general grants of eminent domain authority.

The ecological revolution now underway will change the criteria by which many programs and activities are judged. Institutions are bound to become more complex. To live in harmony with the environment will thus be as great a challenge to the legal profession as to any other.

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<sup>135</sup> 16 U.S.C. § 1283(c) (Supp. IV, 1969).